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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAM WILLIAMSON, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

MCAFEE, INC.,

Defendant.

Case No. 5:14-cv-00158-EJD

**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: January 26, 2017
Time: 10:00 a.m.
Honorable Edward J. Davila

1 SAMANTHA KIRBY, individually and on
2 behalf of all others similarly situated,

3 Plaintiff,

4 v.

5 MCAFEE, INC.,

6 Defendant.
7

Case No. 5:14-cv-02475-EJD

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 26, 2017, at 10:00 a.m., in the Courtroom of the Honorable Edward J. Davila, United States District Judge for the Northern District of California, 280 South 1st Street, San Jose, CA 95113, plaintiffs Sam Williamson and Samantha Kirby (“Plaintiffs”), will and hereby do move the Court, in accordance with Federal Rule of Civil Procedure 23, for an Order:

a. Approving the proposed Corrected Class Action Settlement Agreement and Release (the “Settlement”)¹ as fair, reasonable, and adequate to Plaintiffs and the class members, and directing the Settlement’s consummation according to its terms;

b. Finding that the form and manner of class notice implemented pursuant to the Settlement: (i) constitutes reasonable and the best practicable notice; (ii) constitutes notice reasonably calculated, under the circumstances, to apprise class members of the pendency of the litigation, the terms of the proposed Settlement, the right to object to the proposed Settlement or exclude themselves from the Auto-Renewal Class and the Reference Price Class, and the right to appear at the Final Fairness Hearing; (iii) constitutes due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) meets the requirements of state and federal due process, the Federal Rules of Civil Procedure, and any other applicable state and/or federal laws;

c. Finding that all class members shall be bound by the Settlement as it relates to the class(es) in which each is a member, including the release provisions and covenant not to sue;

d. Directing that judgment be entered dismissing with prejudice all individual and class claims asserted in the litigation and ruling that no costs or fees be assessed on either party other than as expressly provided in the Settlement;

e. Incorporating the release and related provisions set forth in the Settlement and barring any Released Claims against the McAfee Released Parties;

¹ The Settlement is on file at *Williamson* Dkt. 95.

f. Approving payment of the benefits to the class members consistent with the Settlement; and

g. Retaining jurisdiction of all matters relating to the interpretation, administration, implementation, and enforcement of the Settlement.

As discussed in the accompanying memorandum, approval of the Settlement and the related relief requested herein is appropriate under applicable law and well justified under the circumstances of this matter.

This motion is based on this notice of motion and motion; the accompanying memorandum of points and authorities; the Settlement, including all exhibits thereto, and all papers filed in support thereof; the accompanying declarations of Sam Williamson (“Williamson Decl.”), Samantha Kirby (“Kirby Decl.”), Roger N. Heller (“Heller Decl.”), Daniel M. Hattis (“Hattis Decl.”), Tina Wolfson (“Wolfson Decl.”), and Brian Devery (“Devery Decl.”); the argument of counsel; all papers and records on file in these cases; and such other matters as the Court may consider.

Dated: October 29, 2016

By: /s/ Roger N. Heller

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Class Counsel

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court has preliminarily approved the proposed Settlement reached by the parties in this litigation, and approved the parties' proposed notice program. *See Williamson* Dkt. 96. Notice has been, and continues to be, disseminated to the class members in accordance with the notice program approved by the Court. By this motion, Plaintiffs respectfully request that the Court conduct a final review of the Settlement, and approve the Settlement as fair, reasonable and adequate.

The Settlement is the product of extensive arms-length negotiations between the parties and their experienced and informed counsel, and is absolutely fair, reasonable, and adequate given the claims and relief sought, the alleged harm, and the parties' respective litigation risks.

Pursuant to the Settlement, McAfee will provide an \$11.50 Settlement Benefit to all members of the Auto-Renewal Class—each of whom may choose to receive such benefit as cash by submitting a simple cash election form, or otherwise will receive it as a McAfee value certificate to use toward the purchase of McAfee or Intel Security consumer products. The \$11.50 amount represents approximately one-half of the average alleged overcharge for auto-renewal transactions during the class period, as estimated by Plaintiffs. In the aggregate, the \$11.50 Settlement Benefits total approximately \$86 million. In addition, McAfee has agreed to implement important changes regarding both auto-renewal transactions and its advertising of reference prices.

Moreover, the Settlement provides for a robust, multi-pronged notice program and user-friendly cash election process, which have been, and are being, implemented by the Settlement Administrator. The costs of class notice and the other costs of the Settlement Administrator, and any Court-awarded attorneys' fees, costs, and service awards, will be paid separately by McAfee and will thus not reduce the other benefits for the class members under the Settlement.

Notably, the reaction from class members thus far has been very positive. The deadline for class members to opt-out or object is November 28, 2016. As of October 28, 2016, only 143 persons have asked to be excluded, and just 1 objection has been submitted. By contrast, as of

October 28, 2016, 143,384 cash elections have already been submitted by Auto-Renewal Class members, with nearly two months to go until the cash election deadline of December 23, 2016.²

For the foregoing reasons and the others detailed below, the Settlement meets the standards for final settlement approval and should be approved.

II. BACKGROUND

A. Procedural History

This litigation began in early 2014. The first-filed *Williamson* case was filed in this Court on January 10, 2014, alleging claims on behalf of two nationwide classes of McAfee customers: (1) a “Class” of customers who incurred charges for the automatic renewal of their McAfee software (“auto-renewal”); and (2) a “Reference Price Class” consisting of customers who made purchases of McAfee software where McAfee advertised a “reference price” for the product. Plaintiff Williamson alleged that the auto-renewal prices McAfee charged were higher than its disclosures indicated they would be, and that McAfee’s advertised reference prices were misleading in that they did not represent McAfee’s true former selling prices. Plaintiff sought damages, restitution, and injunctive relief on behalf of the Class of auto-renewal customers, and injunctive relief on behalf of the Reference Price Class. (*Williamson* Dkt. 1.)

On March 7, 2014, McAfee filed a motion to dismiss the initial complaint in the *Williamson* case. (*Williamson* Dkt. 21.) Plaintiff Williamson filed an opposition to McAfee’s motion on April 11, 2014, and McAfee filed its reply on May 2, 2014. (*Williamson* Dkt. 25, 27.)

The *Kirby* case was filed on May 29, 2015 on behalf of a nationwide class of McAfee auto-renewal customers, alleging claims that overlapped in significant part with certain of the claims alleged in the *Williamson* case. (*Kirby* Dkt. 1.) On July 1, 2015, the *Kirby* case was formally related to the *Williamson* case, and assigned to this Court, pursuant to Civil Local Rule 3-12. (*Kirby* Dkt. 16.)

On August 22, 2014, the Court entered an Order in the *Williamson* case granting in part

² Devery Decl., ¶¶ 17-18. The final numbers of timely cash elections, opt-outs, and objections will be reported to the Court in advance of the January 26, 2017 Final Fairness Hearing. The parties and Class Counsel will address in their reply papers any timely objections that may be submitted before the November 28, 2016 objection deadline.

1 and denying in part McAfee's motion to dismiss. (*Williamson* Dkt. 40.) On September 8, 2014,
 2 Plaintiff Williamson filed a First Amended Complaint ("FAC"). (*Williamson* Dkt. 42.) On
 3 October 9, 2014, McAfee filed a motion to dismiss the FAC. (*Williamson* Dkt. 48.) Plaintiff
 4 Williamson filed an opposition to McAfee's motion on November 4, 2014, and McAfee filed its
 5 reply on November 25, 2014. (*Williamson* Dkt. 54, 59.) On March 2, 2015, the Court took
 6 McAfee's motion to dismiss the FAC under submission. (*Williamson* Dkt. 66.)

7 On July 8, 2015, the parties in the *Williamson* and *Kirby* cases notified the Court that they
 8 had reached an agreement in principle on certain deal terms for a class settlement and, on July 9,
 9 2015, at the parties' request, the Court entered an Order staying proceedings in the two cases
 10 pending the filing of a proposed class settlement. (*Williamson* Dkt. 69, 70.)

11 **B. Class Counsel's Investigation and Discovery**

12 Class Counsel here conducted a particularly extensive investigation prior to filing suit.
 13 Among other efforts, counsel used a sophisticated, self-developed tracking mechanism to compile
 14 daily pricing and discount information directly from McAfee's and other retailers' websites.
 15 Every day for approximately two years before the initial *Williamson* complaint was filed, and
 16 continuing throughout the litigation, Class Counsel collected daily screenshots and pricing and
 17 discount information from McAfee's website for the software products at issue in this litigation,
 18 as well as similar information from the websites of other retailers. Hattis Decl., ¶¶ 10-11. Class
 19 Counsel also spoke with numerous McAfee customers about their experiences, carefully analyzed
 20 McAfee's consumer agreements and pertinent disclosures, and conducted extensive legal research
 21 regarding potential legal claims. Class Counsel's investigation and research continued after
 22 Plaintiffs filed suit, including continuing to track the information from McAfee's website and
 23 ongoing extensive legal research. Heller Decl., ¶ 5; Hattis Dec., ¶¶ 9-11.

24 Further, Class Counsel engaged in significant discovery, including: reviewing and
 25 conducting a detailed analysis of McAfee's class-wide transactional data for the products at issue
 26 for the class period (which included millions of individual transaction records); reviewing
 27 McAfee's historical consumer agreements and other important documents; propounding and
 28 responding to written discovery requests; and engaging in numerous meet and confer sessions

1 regarding McAfee's electronic document and data systems and Plaintiffs' requests for production
2 of documents. Heller Decl., ¶ 6; Hattis Decl., ¶ 11.

3 **C. Settlement Negotiations**

4 The Settlement Agreement here is the product of hard-fought, arms-length negotiations
5 between the parties. The parties engaged in a full-day mediation session with Professor Eric D.
6 Green of Resolutions, LLC on April 8, 2015. Following that session, the parties continued to
7 negotiate through Prof. Green and, with his assistance, were able to reach an agreement in
8 principle on certain terms in July 2015. During the subsequent months, the parties continued to
9 negotiate through the mediator, holding numerous teleconferences with Prof. Green. With Prof.
10 Green's assistance, the parties ultimately were able to reach an agreement in principle on deal
11 terms. After an agreement in principle was reached on the merits, the parties, with the further
12 assistance of Prof. Green, reached an agreement regarding Class Counsel's request for attorneys'
13 fees and costs. Subsequently, the parties worked hard on finalizing the settlement papers,
14 including the forms of notice and other exhibits, and selecting a proposed Settlement
15 Administrator. Heller Decl., ¶ 7.

16 **D. Preliminary Settlement Approval and Implementation of the Notice Program**

17 Plaintiffs filed a motion for preliminary approval of the Settlement on July 14, 2016, and
18 the Court held a hearing on that motion on August 18, 2016. (*Williamson* Dkt. 91, 94.) The
19 parties filed a corrected version of the Settlement on August 22, 2016, which corrected a
20 scrivener's error as described in the notice accompanying the corrected document. (*Williamson*
21 Dkt. 95.) On August 30, 2016, the Court granted preliminary approval of the Settlement.
22 (*Williamson* Dkt. 96.) ("Preliminary Approval Order"). On September 30, 2016, the parties filed
23 a joint notice clarifying the meaning of a phrase in the Settlement. (*Williamson* Dkt. 97.)
24 Following the entry of the Preliminary Approval Order, Class Counsel have worked closely with
25 the Settlement Administrator and counsel for McAfee regarding implementation of the notice
26 program and cash election process. Heller Decl., ¶ 14.

III. THE SETTLEMENT

A. The Settlement Classes

In the Preliminary Approval Order, the Court certified two classes for settlement purposes only. The “Auto-Renewal Class” is defined as:

All persons in the United States who paid McAfee for the automatic renewal of a subscription license for any McAfee software (including software branded under the “McAfee” or “Intel Security” names) from January 10, 2010 to February 10, 2015, and whose first auto-renewal charge was at a price greater than the price paid to McAfee for the initial subscription license. The Auto Renewal Class shall not include any person whose charges as described above were fully refunded by McAfee or fully charged back through such person’s credit or debit card issuer.

The “Reference Price Class” is defined as:

All persons in the United States (1) who initially purchased from McAfee or manually renewed through McAfee a subscription license for any McAfee software (including software branded under the “McAfee” or “Intel Security” names) from January 10, 2010 to February 10, 2015, and (2) whose subscription license was initially purchased or manually renewed at a discounted price.

Excluded from both classes are employees of McAfee and its parents and affiliates, counsel for all parties, the Court, and the Court’s staff. (Settlement, ¶¶ 1-2; *Williamson* Dkt. 96 at p. 14)

B. Benefits to Class Members

1. \$11.50 Settlement Benefit for All Auto-Renewal Class Members

Under the terms of the Settlement, *all* class members in the Auto-Renewal Class will receive an \$11.50 Settlement Benefit. They each will have the option of receiving the \$11.50 benefit as: (a) cash; or (b) an \$11.50 McAfee value certificate. They can choose the cash option by submitting a simple cash election form, and may submit cash election forms electronically via the Settlement Website or by mail. The deadline to submit cash elections is December 23, 2016. As of October 28, 2016, 143,384 cash elections have already been filed.³ Class members in the Auto-Renewal Class who do not submit a timely cash election will still receive the Settlement Benefit, in the form of an \$11.50 McAfee value certificate to use toward the purchase of McAfee

³ Devery Decl., ¶ 17. For cash elections submitted online, class members have the choice of receiving their cash payment either as a check or as a direct credit to their PayPal account. For cash elections submitted by mail, payments will be by check.

1 or Intel Security consumer products. (Settlement, ¶¶ 28-35)

2 The \$11.50 benefit amount represents approximately one-half of the average alleged
3 overcharge for auto-renewal transactions during the class period—a strong result, particularly
4 given the substantial challenges and risks these class members faced in the litigation. *See infra*
5 sections VI.B.1-3. In the aggregate, the \$11.50 Settlement Benefits that McAfee will provide
6 total approximately \$86 million for the approximately 7.53 million members of the Auto-Renewal
7 Class.

8 **2. Practice Changes**

9 McAfee also agreed to implement important changes addressing both the auto-renewal
10 pricing and reference price allegations in the litigation. Specifically, McAfee agreed to
11 implement the following for two years after the Settlement receives final approval by the Court:

12 (1) McAfee will include at the point of sale in any sales process involving sales made by
13 McAfee at a discount off a reference price and subject to automatic renewal (including for sales
14 made through the McAfee website and through the in-software purchase path), the following or
15 materially similar language: “Your subscription(s) will be automatically renewed at the
16 undiscounted subscription price in effect at the time of renewal. The subscription price is subject
17 to change.” A hyperlink will be provided that links to a webpage that includes the current
18 undiscounted subscription price for the applicable McAfee software or McAfee will display the
19 undiscounted subscription price (labeled the “undiscounted subscription price”) for the applicable
20 McAfee software on the point of sale webpage. Substantially similar disclosures will be added to
21 a FAQ or informational page on McAfee’s website, to notices sent by McAfee to subscribers in
22 connection with automatic-renewal, and to McAfee’s End User License Agreement.

23 (2) Where McAfee includes a reference price in its promotions, notices, advertisements or
24 at the point-of-sale (including through the McAfee homepage and through the in-software
25 purchase path), for any McAfee software product offered by McAfee to United States consumers:
26 (a) McAfee will use as such reference price only a price at which McAfee has offered that
27 software product on the McAfee homepage to the public for at least 45 days within the preceding
28 calendar quarter; and (b) McAfee will offer that software product on the McAfee homepage to the

1 public at a non-sale price for at least 45 days within the current calendar quarter.

2 (Settlement, ¶ 37; *Williamson* Dkt. 97 (clarifying notice))

3 **C. Opt-Out Procedure**

4 Any person within the Auto-Renewal Class definition may request to be excluded from
5 the Auto-Renewal Class by sending a written request stating their desire to be excluded to the
6 Settlement Administrator. Likewise, any person within the Reference Price Class definition may
7 request to be excluded from the Reference Price Class by sending a written request stating their
8 desire to be excluded to the Settlement Administrator. The deadline to request exclusion is
9 November 28, 2016. (Settlement, § IV; *Williamson* Dkt. 96)

10 **D. Objection Procedure**

11 Any class member may object to the Settlement (except to the extent it relates only to a
12 class in which the class member in question is not included or from which the class member in
13 question has timely and validly requested exclusion), Class Counsel's application for attorneys'
14 fees and costs, and/or the request for Plaintiff service awards. To be considered, an objection
15 must be in writing, must be filed with or mailed to the Court, and mailed to Class Counsel and
16 McAfee's counsel, at the addresses listed in the Long Form Class Notice, and must include the
17 information proscribed by the Long Form Class Notice. The deadline to object is November 28,
18 2016. (Settlement, § IV; *Williamson* Dkt. 96)

19 **E. Separate Payment of Attorneys' Fees, Costs, and Service Awards**

20 Concurrently with this motion, Class Counsel are filing an application for an award of
21 reasonable attorneys' fees and costs. Class Counsel are requesting attorneys' fees in the amount
22 of \$2,321,225.92, plus reimbursement of \$78,774.08 in litigation costs. Class Counsel's fee
23 application also requests service awards of \$1,250 for each of the two Plaintiffs. Any such
24 attorneys' fees, costs, and service awards that are granted by the Court will be paid by McAfee in
25 addition to (*i.e.*, on top of) the settlement benefits provided to the class members (Settlement, §
26 VII)

27 **F. Separate Payment of Administrative Costs**

28 Notice costs and the other fees and costs of the Settlement Administrator will likewise be

1 paid by McAfee in addition to (*i.e.*, on top of) the settlement benefits provided to the class
 2 members. (Settlement, ¶ 5)

3 **G. Release**

4 In exchange for the benefits provided by the Settlement, class members will release
 5 McAfee and related entities from any claims they may have related to the issues in these cases.
 6 (Settlement, § VIII)

7 **IV. NOTICE HAS BEEN DISSEMINATED TO CLASS MEMBERS PURSUANT TO**
 8 **THE COURT-APPROVED NOTICE PROGRAM**

9 The robust notice program approved by the Court in the Preliminary Approval Order has
 10 been, and continues to be, implemented by the parties and the Settlement Administrator. This
 11 program—which includes direct email/mail notice to all class members, a dedicated Settlement
 12 Website, and an informational Toll-Free Number—is well-designed to give the best notice
 13 practicable. *See generally* Devery Decl.

14 **A. Direct Notice to Class Members**

15 Pursuant to the Court-approved notice program, McAfee's customer records were utilized
 16 to provide direct email and mailed notice to the class members. McAfee provided the Settlement
 17 Administrator with a Class List that included the last known email address and mailing address
 18 for each class member. The Settlement Administrator then sent the appropriate email notices to
 19 class members at the email addresses included in the Class List. For any class member with
 20 respect to whom the Settlement Administrator received notice that the email notice was not
 21 received, the Settlement Administrator updated the mailing address for that class member in the
 22 Class List, through the U.S. Postal Service National Change of Address Database, and then
 23 mailed the appropriate notice to that class member at their mailing address as updated. For
 24 mailed notices returned with forwarding address information, the Settlement Administrator is
 25 promptly re-mailing the appropriate notice to the new address indicated. Devery Decl., ¶¶ 7-14;
 26 Settlement, § III.

27 **B. Settlement Website and Toll-Free Number**

28 As directed by the Court, the Settlement Administrator established and is maintaining a

Settlement Website, www.McafeeWilliamsonSettlement.com, where cash elections can be submitted electronically and where class members can obtain additional information and access copies of the Settlement, the Long Form Class Notice, the operative complaints, Class Counsel's application for attorneys' fees and costs, and other case documents. The Settlement Administrator also established and is maintaining a toll-free telephone number where class members can obtain additional information. Devery Decl., ¶¶ 15-16; Settlement, ¶ 9.

V. THE RESPONSE FROM THE CLASS HAS BEEN VERY POSITIVE

The response from class members thus far has been very positive. The deadline for class members to opt-out or object is November 28, 2016. As of October 28, 2016, only 143 persons have asked to be excluded and just 1 objection has been submitted. Devery Decl., ¶ 18.⁴

By contrast, the Settlement Administrator reports that, as of October 28, 2016, 143,384 cash elections already have been submitted by Auto-Renewal Class members, with nearly two months to go until the December 23, 2016 cash election deadline. Devery Decl., ¶ 17.

VI. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The Class Action Settlement Approval Process

Proceedings under Federal Rule of Civil Procedure 23 have led to a defined three-step procedure for approval of class action settlements:

- (1) Certification of a settlement class and preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval.
- (2) Dissemination of notice of the proposed settlement to the affected class members.
- (3) A formal fairness hearing, or final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement are presented.

See Manual for Complex Litigation (Fourth) §§ 21.63 *et seq.* (Fed. Jud. Center 2004). This procedure safeguards class members' procedural due process rights and enables the Court to fulfill its role as guardian of class interests. *See* 4 Newberg on Class Actions, § 11.22 *et seq.* (4th

⁴ The parties will address all timely submitted objections in advance of the Final Fairness Hearing.

ed. 2002) (hereinafter “Newberg”).

The Court completed the first step in the settlement approval process when it issued the Preliminary Approval Order (*Williamson* Dkt. 96), and the second step—dissemination of notice to the class members—has been, and continues to be, implemented by the Settlement Administrator. *See* Devery Decl. By this motion, Plaintiffs respectfully request that the Court take the third and final step and grant final approval of the Settlement.

B. Final Approval of the Settlement Is Appropriate

Public policy “strong[ly] . . . favors settlements, particularly where complex class action litigation is concerned.” *In re Syncor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *3 (N.D. Cal. Mar. 18, 2013).

In weighing final approval of a class settlement, the Court’s role is to determine whether the settlement, taken as a whole, is fair, reasonable, and adequate. *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). The Ninth Circuit has established a list of factors to consider when assessing whether a proposed settlement is fair, reasonable and adequate: (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the benefits offered in the settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *See Churchill Village*, 361 F.3d at 575; *Hanlon*, 150 F.3d at 1026. Application of these factors here supports the conclusion that the Settlement is fundamentally fair, reasonable, and adequate, and should be finally approved.

1. The Strength of Plaintiffs’ Case and the Risk, Expense, Complexity, and Likely Duration of Further Litigation

The Settlement here appropriately balances the costs, risks, and likely delay of further litigation, on the one hand, against the benefits provided, on the other hand. *See* 4 Newberg on

1 Class Actions § 11.50 at 155 (“In most situations, unless the settlement is clearly inadequate, its
2 acceptance and approval are preferable to lengthy and expensive litigation with uncertain
3 results.”). The result here is a strong one, given the significant challenges and risks that Plaintiffs
4 and the class members continue to face in the litigation—risks that Plaintiffs and Class Counsel
5 were well-positioned to evaluate based on their extensive investigation, discovery, and analysis of
6 the pertinent pricing and sales data.

7 With respect to the auto-renewal claims, among other arguments that McAfee has made
8 and/or indicated it would make if the litigation proceeded are: (a) its disclosures regarding auto-
9 renewal pricing would not mislead a reasonable consumer; (b) the prices charged for auto-
10 renewals were charged to millions of auto-renewal customers and to a significant number of non-
11 auto-renewal customers as well; (c) its policies regarding auto-renewal pricing (and, specifically,
12 the exclusion of “promotional” and “discount” pricing) were disclosed in its form consumer
13 agreements and elsewhere; and (d) auto-renewal customers were sent advance notice of the prices
14 they would be charged and could cancel their renewed subscriptions within 60 days after being
15 charged. With respect to the reference price claims, among other arguments that McAfee has
16 made and/or indicated it would make if the litigation proceeded are: (a) its advertised reference
17 prices were sufficiently based on millions of actual auto-renewal sales and on non-auto-renewal
18 sales as well; (b) customers got software products worth what they paid for them; and (c) its
19 reference prices would not mislead a reasonable customer. Moreover, McAfee’s second motion
20 to dismiss was pending in the *Williamson* case when the Settlement was reached.

21 While Plaintiffs believe they could overcome these challenges, they are indicative of the
22 serious risks that Plaintiffs and the proposed classes would face if the litigation were to continue.
23 Indeed, several of McAfee’s arguments, if successful, would threaten class members’ entitlement
24 to any relief at all. The Settlement provides considerable relief while allowing class members to
25 avoid the risks of unfavorable, and in some cases dispositive, rulings on these and other issues.

26 Having conducted a thorough investigation and analysis of the pricing and class-wide
27 sales data for the products at issue, and of other pertinent facts, and Class Counsel having
28 significant experience litigating cases involved alleged misleading pricing and other alleged

misleading advertising, Plaintiffs and Class Counsel were well-positioned to evaluate the strengths and challenges of their claims in this matter and to make an informed decision that the favorable settlement here represented a good deal for the class members in light of the real challenges faced. The Settlement also provides another significant benefit not available if the litigation were to go to trial—prompt relief. Proceeding to trial, even if successful, would likely add years to the resolution of this litigation, given the legal and factual issues raised and likelihood of appeals.

2. The Risk of Maintaining Class Action Status Throughout the Trial

McAfee disputes whether a class trial would be manageable, and has made clear that it would likely oppose a motion for class certification on that basis. While Plaintiffs believe they would have a strong argument for certifying litigation classes here, obtaining and maintaining class action status throughout the trial is always a challenge, and is far from guaranteed, in a complex case like this one.

3. The Benefits of the Settlement

The Settlement provides substantial, valuable relief, including the \$11.50 Settlement Benefit to all members of the Auto-Renewal Class and important changes that will benefit the class members and millions of McAfee customers going forward.

All members of the Auto-Renewal Class will receive an \$11.50 Settlement Benefit without having to take any action. They each have the choice of receiving the \$11.50 as cash by filing a Cash Election form, or, if they do not file a cash election form, they will still receive the benefit in the form of an \$11.50 McAfee value certificate. The cash election form and submission process are straightforward and user-friendly, and are designed to make submitting forms and receiving payments convenient, including by providing an online claim submission option and the option of receiving payments in the form of a check or a direct PayPal credit. As of October 28, 2016, 143,384 cash elections have already been submitted, with nearly two months remaining until the submission deadline.

The \$11.50 Settlement Benefit amount represents approximately one-half (1/2) of the average alleged overcharge for auto-renewal transactions during the class period as estimated by

1 Plaintiffs,⁵ which is a particularly strong result when one considers the relative strengths and
 2 weaknesses of the parties' positions and the substantial risks and uncertainty of ongoing
 3 litigation. *See supra* section VI.B.1. Given the not insubstantial risk that the members of the
 4 Auto-Renewal Class might have received nothing at all had the litigation proceeded to trial, a
 5 50% recovery of the average overcharge is a very good achievement here, and certainly
 6 represents a reasonable compromise warranting Court approval. That is particularly so given that
 7 the Settlement would provide prompt payment, while further litigation, even if successful, would
 8 likely require years before these class members saw any benefits.

9 Moreover, the Settlement includes important changes by McAfee addressing both the
 10 auto-renewal pricing and reference price claims in the Litigation. *See supra* section III.B.2. For
 11 the auto-renewal claims, the improved disclosures provided for in the Settlement will make
 12 McAfee's auto-renewal pricing policies significantly clearer, helping customers to make informed
 13 choices regarding their software subscriptions. With respect to the reference price claims, the
 14 Settlement provides clear, objective terms governing the circumstances in which McAfee may
 15 advertise a reference price, helping to ensure that McAfee will not advertise reference prices
 16 without an appropriate basis in its actual prices, and thus closely tracking the relief sought with
 17 respect to these claims.⁶

18 **4. The Extent of Discovery and the Stage of Proceedings**

19 For this factor, courts look to whether the parties have sufficient information to make an
 20 informed decision with respect to the settlement. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d

21 ⁵ While some members of the Auto-Renewal Class had their annual subscriptions auto-renewed
 22 more than once during the class period, and while Plaintiffs believe they would have a credible
 23 basis for seeking, at trial, damages based on all such auto-renewals, McAfee has argued that even
 24 if Plaintiffs' auto-renewal claims had merit (which McAfee disputes), customers would have at
 25 least been on notice of McAfee's auto-renewal pricing after incurring their first auto-renewal
 26 charge. Thus, there is uncertainty regarding whether Plaintiffs could have recovered damages per
 27 customer beyond a single auto-renewal transaction even in the proverbial "home run" scenario.
 Plaintiffs estimate that, on average, class members in the Auto-Renewal Class had their
 subscriptions auto-renewed a little over two times during the class period. Even if every one of
 these transactions were hypothetically subject to recovery, the \$11.50 benefit amount would still
 represent approximately one-quarter (1/4) of the average alleged total overpayments per class
 member, still a very reasonable result under the circumstances.

28 ⁶ The claims pled regarding McAfee's reference prices sought injunctive relief only. (*Williamson*
 Dkt. 42, ¶¶ 7, 150, 160.) The practice changes obtained for the Reference Price Class pursuant to
 the Settlement Agreement appropriately track the relief sought for these claims.

1 454, 459 (9th Cir. 2000).

2 This factor weighs particularly heavily in favor of approving the Settlement here. As
 3 explained in more detail above (*see supra* section II.B), Class Counsel conducted a particularly
 4 extensive factual investigation in this matter, including, *inter alia*: (a) tracking on a daily basis
 5 and analyzing—for approximately two years before filing suit, and continuing throughout the
 6 litigation—the pricing and discount information for the products at issue from McAfee’s website
 7 and the websites of other retailers; (b) analyzing class-wide transactional data, produced by
 8 McAfee in discovery, for the products at issue (which included millions of transactional records);
 9 and (c) reviewing and analyzing the pertinent disclosures and other documents. As a result of
 10 these extensive efforts, Plaintiffs were well-informed in evaluating their claims and in negotiating
 11 the Settlement that is presented to the Court for approval. Moreover, the two fully-briefed
 12 motions to dismiss filed by McAfee significantly informed Plaintiffs’ evaluation of the relative
 13 strength of their legal claims. Accordingly, Plaintiffs and Class Counsel had sufficient
 14 information to make an informed decision about the Settlement and to determine that it
 15 represented a favorable and fair result for the class members.

16 **5. The Experience and Views of Counsel**

17 In considering a class settlement, “[t]he recommendations of plaintiffs’ counsel should be
 18 given a presumption of reasonableness.” *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at
 19 *4 (N.D. Cal. Feb. 2, 2009); *see also Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2016
 20 WL 613255, at *3 (N.D. Cal. 2016) (“[T]he views of Plaintiffs’ counsel, [including some of Class
 21 Counsel in this action,] who are experienced in litigating and settling complex consumer class
 22 actions, weigh in favor of final approval.”) (citing *Linney v. Cellular Alaska Partnership*, 1997
 23 WL 450064, at *5 (N.D. Cal. July 18, 1997)). Here, counsel for all parties endorse the Settlement
 24 Agreement as fair, adequate, and reasonable. Heller Decl., ¶ 29; Hattis Decl., ¶ 29; Wolfson
 25 Decl., ¶ 26.

26 Class Counsel have extensive experience litigating and settling consumer class actions and
 27 other complex matters.⁷ They have conducted an extensive investigation into the factual and

28 ⁷ Heller Decl., ¶¶ 2-4, 15-18; Hattis Decl., ¶¶ 3-7; Wolfson Decl., ¶¶ 3-4, Ex. A.

1 legal issues raised in this litigation. The fact that qualified and well-informed counsel endorse the
 2 Settlement as being fair, reasonable, and adequate weighs heavily in favor of the Court approving
 3 the Settlement.

4 **6. The Presence of a Government Participant**

5 Notice has been issued pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715 (*see*
 6 *Williamson* Dkt. 92). To date, no governmental entity has intervened.

7 **7. The Class Response to Date Favors Final Approval**

8 While it is premature to fully evaluate this factor, the response thus far has been very
 9 positive. The deadline for class members to opt-out or object is November 28, 2016. As of
 10 October 28, 2016, only 143 persons have asked to be excluded and just 1 objection has been
 11 submitted. Devery Decl., ¶ 18. By contrast, the Settlement Administrator reports that as of
 12 October 28, 2016, 143,384 cash elections have already been submitted, with nearly two months to
 13 go until the December 23, 2016 cash election deadline. Devery Decl., ¶ 17.⁸

14 **8. Lack of Collusion Between the Parties**

15 “Before approving a class action settlement, the district court must reach a reasoned
 16 judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion
 17 among, the negotiating parties.” *City of Seattle*, 955 F.2d at 1290 (citations omitted). “Where a
 18 settlement is the product of arms-length negotiations conducted by capable and experienced
 19 counsel, the court begins its analysis with a presumption that the settlement is fair and
 20 reasonable.” *Garner v. State Farm Mut. Auto Ins. Co.*, 2010 WL 1687832, *13 (N.D. Cal. Apr.
 21 22, 2010); *see also* *See 4 Newberg* § 11.41; *In re Heritage Bond Litig.*, 2005 WL 1594403, at *2-
 22 3 (C.D. Cal. June 10, 2005).

23 The Settlement here is the product of hard-fought, arms-length negotiations between the
 24 parties and their well-qualified counsel. The parties participated in a full-day mediation session
 25 and extensive ongoing negotiations through an experienced and well-respected mediator,
 26

27 ⁸ The final numbers of timely cash elections, opt-outs, and objections will be reported to the
 28 Court in advance of the January 26, 2017 Final Fairness Hearing. The parties and Class Counsel
 will address in their reply papers any timely objections that may be submitted before the
 November 28, 2016 objection deadline.

Professor Eric D. Green of Resolutions LLC, and were able to reach an agreement with the help of Prof. Green. Subsequently, the parties worked hard to finalize the settlement papers and to select a proposed Settlement Administrator. Heller Decl., ¶ 7. Throughout these negotiations, the parties were represented by counsel experienced in the prosecution, defense and settlement of complex class actions.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order:

- a. Approving the proposed Settlement as fair, reasonable, and adequate to Plaintiffs and the class members, and directing the Settlement's consummation according to its terms;
- b. Finding that the form and manner of class notice implemented pursuant to the Settlement: (i) constitutes reasonable and the best practicable notice; (ii) constitutes notice reasonably calculated, under the circumstances, to apprise class members of the pendency of the litigation, the terms of the proposed Settlement, the right to object to the proposed Settlement or exclude themselves from the Auto-Renewal Class and the Reference Price Class, and the right to appear at the Final Fairness Hearing; (iii) constitutes due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) meets the requirements of state and federal due process, the Federal Rules of Civil Procedure, and any other applicable state and/or federal laws;
- c. Finding that all class members shall be bound by the Settlement as it relates to the class(es) in which each is a member, including the release provisions and covenant not to sue;
- d. Directing that judgment be entered dismissing with prejudice all individual and class claims asserted in the litigation and ruling that no costs or fees be assessed on either party other than as expressly provided in the Settlement;
- e. Incorporating the release and related provisions set forth in the Settlement and barring any Released Claims against the McAfee Released Parties;
- f. Approving payment of the benefits to the class members consistent with the Settlement; and

1 g. Retaining jurisdiction of all matters relating to the interpretation,
2 administration, implementation, and enforcement of the Settlement.

3
4
5 Dated: October 29, 2016

By: /s/ Roger N. Heller

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